IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL APPEAL NO. 14 OF 2004

Shaikh Abdul Kadar,
presently undergoing
sentence at Central
Jail, Aguada, Bardez,
Goa. ... Appellant.

Versus

S T A T E ... Respondent.

Mr. S. G. Dessai, Senior Advocate with Mr. A. B. D'Sa, advocate for the appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : P. V. HARDAS &
N. A. BRITTO, JJ.

DATE : 17th August, 2004

ORAL JUDGMENT (Per Hardas, J.)

The appellant who stands convicted for an offence punishable under Sections 302 and 307 of the Indian Penal Code and under Section 25 of the Arms Act, 1959, sentenced to imprisonment for life and to pay a fine of Rs.5,000/-, in default to undergo further Rigourous Imprisonment for one year, Rigourous Imprisonment for five years and a fine of Rs.2,000/-, in default to undergo further Rigourous Imprisonment for two months and Simple Imprisonment for six months and to pay a fine of Rs.500/-, in default to undergo Simple Imprisonment for seven years, respectively, by the Sessions Judge, Panaji, by Judgment dated 31st December, 2003, in Sessions Case No.23 of 2002, has filed the present appeal challenging his conviction and sentence.

2. The facts in brief as are necessary for the decision of this Appeal can be stated as under:-

P.W.9, P.S.I. Asish Shirodkar was attached to the Panaji Police Station. On 9th February, 2002, at about 4.30 p.m., P.W.1, Shaikh Safina, came to the Police Station and informed him that her parents were shot by the appellant/accused. He accordingly asked P.W.13, P.S.I. Chanappa @ Chetan Patil, to verify the facts about the incident. P. W. 9, P.S.I. Asish Shirodkar, then recorded the complaint of P.W.1, Shaikh Safina at Exh.19. After verifying the facts with P.W.13, P.S.I. Chetan Patil, he registered an offence under Sections 302 and 307 of the Indian Penal Code. P.W.13, P.S.I. Patil, who on the relevant date was posted on the bandobast duty near the Old Goa Medical College, received a phone call on his mobile from P.W.9, P.S.I. Shirodkar. He accordingly went with the Police staff to the scene of the incident and on going inside the house, he noticed one aged person lying dead in a pool of blood. He also noticed one lady having serious injuries. He apprehended the accused and requested the constable to keep guard so as to prevent the accused from escaping. In the meanwhile, a police control van arrived at the scene of the offence and the injured was shifted to the Goa Medical College Hospital.

3. P.W.12, P.I. Mahesh Gaonkar, was attached to the

Panaji Town Police Station as In-charge of the Police Station. On being informed about the incident he proceeded to the scene of the offence and noticed deceased Gauri Shankar lying in a pool of blood. He was informed that injured P.W.4, Zainubi had been shifted to the Goa Medical College Hospital by the police control van. A scene of the offence Panchanama at Exh.26 colly. came to be drawn in the present of P.W.5, Ashif Akbar Zattu. Various articles came to be attached by the said Panchanama, which comprised of 12 bore empty cartridges, artificial dentures of the deceased, sandals, pieces of green-coloured bangles and blood soaked pellets from the pool of blood near the dead body of the deceased. The accused, who was at the scene of the offence, came to be arrested. The 12 bore gun in his possession came to be attached as well as 3 live cartridges which were on his person and an empty cartridge, which was lying in the breech of the 12 bore gun. The inquest Panchanama of the dead body came to be drawn and the dead body was referred for post-mortem examination. The post-mortem examination on the deceased was conducted by P. W. 7, Dr. Silvano Dias Sapeco and his post-mortem report is at Exh.31. P.W.7 Dr.Silvano, Dias Sapeco, had also examined the accused and the certificate is at Exh. 40. P.W.7, Dr. Sapeco, had also examined P.W.3, Azim Khan and his certificate is at Exh.42. During the custodial interrogation, the accused has expressed his willingness to produce live cartridges. The memorandum came to be recorded in the presence of P.W.6, Manuel

Carvalho. The accused produced 9 cartridges from his residence, which were attached vide Panchanama at Exh.28. Enquiry was made in respect of the arms licence and it transpired during investigation that the licence had not been renewed.

4. On completion of the investigation, a charge-sheet came to be filed and after committal of the case to the Court of Sessions, the Sessions Judge, North Goa, Panaji vide Exh.6, framed a charge against the appellant/accused for offence punishable under Sections 302 and 307 of the Indian Penal Code and Section 25 of the Arms Act. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 13 witnesses which included P.W.1, Shaikh Safina, P.W.2, Shaikh Sarfaraj, P.W.3, Azim Khan and P.W.4, Zainubi, as eye-witnesses. The defence of the appellant/accused appears to be that he had inflicted the injuries in exercise of the right of private defence. The trial Judge repelled the defence of the accused/appellant and convicted and sentenced him as aforestated. Hence the present appeal.

5. The pivot of the prosecution case is the eye-witness account. P.W.1, Shaikh Safina, who is the daughter of the deceased states that she alongwith her parents was residing in a part of the house of the accused. They had one room and a kitchen in their possession, while

the rest of the house was occupied by the accused and his family. She states that on the day of the incident at about 3.50 p.m. she and her sister were getting ready in order to see the carnival parade. Her younger brother Shaikh Sakhil was taking bath near the well. Her father, deceased Shaikh Salim, had asked Shaikh Sakhil to clean the gutter and at that time she heard some noise of quarrel near the well. She came out to see what was happening and she saw her brother Shaikh Sakhil explaining to the servant of the accused, named Ismail, about the gutter being choked by the sewage water. The servant of the accused started abusing Shaikh Sakhil. Since this was a usual affair, she did not pay much attention to it and went inside the room. Her mother. P.W.4, Zainubi, came and stood near the steps. P.W.1, Shaikh Safina came to the verandah near the kitchen and asked her father about going to the carnival parade. While she was talking to her father, she heard some loud sound and saw her mother falling down at the place where she was standing. She observed the accused standing with a gun in his hand at a distance of about 10mts. from the place where her mother was standing. Her mother, P.W.4, Zainubi, suddenly stood up and then fell down in the verandah. At that time the deceased was near the kitchen room. The deceased told P.W.1, Shaikh Safina to come out of the house. Her sister and her other brother Sakhil took their mother inside the room and locked the door. P.W.1 Shaikh Safina, her father, the deceased Shaikh Salim, her brothers and two

servants came out of the house and were trying to go inside the room. At that time the accused fired a shot at them. However, the shot did not cause any injury to anyone. From her cellular phone she called her cousin P.W.3, Azim Khan, and informed him that the accused had fired at them. Her mobile phone then stopped functioning and she therefore ran to the neighbours house in order to inform the Police. Her neighbours told her that they had already informed the police. She also saw that her cousin P.W.3, Azim Khan, had come to their house. P.W.3, Azim Khan, was accompanied by P.W.8, Somu Setanguard and they went inside the room. She heard the sound of the gun being fired and when she reached near the door of the room she saw her father had fallen near the door and was unconscious. The accused came near her father and fired a shot at the head of her father from a close range. She states that the accused had fired his gun at the head of her father from a distance of about 7 to 8 mts. On seeing the shot being fired at her father, she went running to the Panaji Police Station and lodged the report at Exh.19. In the cross-examination certain suggestions were put to her that her family was interested in grabbing the house of the accused in which they were residing and that they had grabbed the house and the household items after the incident. She has also denied the suggestion that prior to residing in the house of the accused they were residing at a house in Taleigao from which they were thrown out. She has also denied the suggestion that the accused had allowed them

to stay in the present house only for a period of 15 days. She has also denied the suggestion that after a month the accused had told them to leave the house and that they were quarrelling with the accused and that on account of that the accused asked them to leave the house. Certain omissions have been brought on record vis-a-vis her complaint at Exh.19. These omissions are:-

(i) that she had not stated in her complaint that at about 3.50 p.m. she and her sister were getting ready in order to go to the carnival parade;

(ii) that she had not stated in her complaint that before taking bath her father had asked her brother Sakhil to clean the gutter which was full of sewage water;

(iii) that she had not stated that her mother had come and was standing near the place;

(iv) in her complaint she had not stated that while talking to her father she heard a loud sound and saw her mother falling down at the place where she was standing;

(v) that she had not stated in her complaint that her sister and her brother Sakhil took her mother inside the room;

(vi) that in her complaint she had not stated that her brother Sakhil locked her mother and her sister inside the room;

(vii) that she had not stated in her complaint that she, her brother, her father and two servants had come out of the house;

(viii) that she had not stated in her complaint that as they were trying to go inside the room, the accused fired his gun at them;

(ix) that she had not stated that the second shot did not hit anyone;

(x) that she had not stated in her complaint that from her mobile phone she gave a call to her cousin P.W.3, Azim Khan, informing him about the incident;

(xi) that she had not stated that thereafter her mobile phone stopped functioning and, therefore, she ran to her neighbours house for informing the police;

(xii) that she had not stated that her neighbours told her that they had already informed the police;

(xiii) that she had not stated that in the meantime,

she saw her cousin P.W.3, Azim Khan, who had come to her house;

(xiv) that in her complaint she had not stated that P.W.3, Azim Khan, was accompanied by his friend P.W.3 Somu;

(xv) that she had not stated that when she reached near the door of her room she say that her father had fallen near the door and was unconscious;

(xvi) that she had not stated that P.W.3, Azim Khan also came running near her father and he too was bleeding on the right hand near the elbow;

(xvii) that she had not stated in her complaint that she saw the accused shooting at the head of her father from a distance of about 7 to 8 mts.; and

(xviii) that she had not stated in her complaint that she had gone running to the police station.

6. In her complaint at Exh.19, she had made no reference about the presence of P.W.3, Azim Khan and P.W. 8, Somu. There is an omission in respect of the deceased telling her brother to clean the gutter, but there is no omission in respect of her brother cleaning the gutter and the servant of the accused abusing him. The other omissions

in respect of the incident do not establish that she had not witnessed the incident. These omissions in respect of the incident pertain mostly to the manner of her stating in the court room and omitting certain details, but the averments in the complaint are to the effect that it was the accused who had fired at her mother and had also fired at her father.

7. In the cross-examination she had denied the suggestion that P.W.3, Azim Khan, had been hired by her father to "finish" the family of the accused in order to grab the house of the accused. She has also denied that P.W.3, Azim Khan, had come to the spot of the incident and had attacked the accused. She has denied the suggestion that she had not seen as to who had fired the gunshot and that she had only heard the gun being fired.

8. The prosecution has also examined P.W.2, Shaikh Sarfaraj, who is the son of the deceased Shaikh Salim. He states that on 9th February, 2002, at about 4 p.m. he was cutting vegetables in the kitchen, while his mother was sitting on the steps outside the house. His younger brother, Shaikh Sakhil wanted to take bath near the well, but the father told him to clean the gutter first to prevent water from the gutter percolating in the well. Accordingly, his brother Sakhil was cleaning the gutter and the accused came there and started abusing him and the family members. The accused went inside the house and came with a gun and fired

the gun at his mother. His mother P.W.4, Zainubi, sustained injuries on her hands and legs. P.W.2, Sarfaraj, immediately informed about this incident to his father. His sister P.W.1, Safina spoke on his cellular phone to P.W.3, Azim Khan and informed him about the incident. The accused fired the gun a second time but the bullet did not hit anyone. In the meantime, P.W.3, Azim Khan, came there accompanied by a person named Somu, P.W.8, The accused fired a third shot at his father, which also hit P.W.3, Azim Khan and injured his father. The accused again loaded the gun and fired a fourth time. The fourth shot was fired by the accused at the head of his father from a close range. In the cross-examination he has denied the suggestion that he was caught red-handed alongwith a friend while committing theft inside the godown of the Education Department at Panaji. He had admitted that a criminal case has been filed in the Court of the Judicial Magistrate First Class at Panaji. He has admitted that their relations with the accused at the time of the incident were not good. He has also admitted that there used to be frequent quarrels between his family and the accused. He has also admitted that the quarrels were on account of the fact that the accused wanted to evict them from his house and they were refusing to do so. He has also admitted that the accused had threatened them with gun on two earlier occasions prior to the present incident. He has denied the suggestion that P.W.3,Azim Khan, was hired by his father and that he, his father and P.W.3, Azim Khan, had assaulted the accused on

the day of the incident. He has denied the suggestion that the accused got excited after seeing P.W.3, Azim Khan, and after the accused was assaulted by them the accused went inside the house and brought the gun. He also denied the suggestion that the accused had brought the gun in order to kill P.W.3, Azim Khan, in self-defence. He has also denied the suggestion that the accused had aimed at P.W.3, Azim Khan. By mistake the shots were fired at his father and his mother. In cross-examination, the omission was brought out that he had not stated that P.W.1, Shaikh Safina, spoke to P.W.3, Azim Khan, on his mobile and had informed him about the incident. There is an omission in respect of the second shot having missed hitting everyone.

9. The prosecution has also examined P.W.3, Azim Khan, who states that on the day of the incident, he was preparing to attend the carnival parade and at that time he received a telephone call from P.W.1, Safina, informing him that the accused had shot her mother. On hearing this, P.W.3, Azim Khan, rushed to the house of the deceased alongwith his friend P.W.8, Somu. On reaching the house, he was informed by deceased Salim and others that P.W.4, Zainubi, had been shot by the accused. He went to the place where P.W.4, Zainubi was lying. While he was attempting to lift P.W.4, Zainubi, with the help of the deceased Shaikh Salim, Somu and the son of the deceased, the accused started abusing deceased Shaikh Salim and fired a shot with the gun

at the deceased Salim. The deceased Salim fell down and P.W.3, Azim Khan, also received bullet injuries. On receiving the injuries, all of them ran and climbed down the steps of the gallery of the house while deceased Salim had collapsed on the ground. The accused loaded the gun, came near deceased Salim and fired a shot at his head from close range. Salim died on the spot as result of the injuries. The accused thereafter attempted to fire a shot at P.W.4, Zainubi, but P.W.3, Azim Khan and others pelted stones towards the accused to prevent him from further firing the gun. After about 10 minutes, or so, police arrived at the spot in a jeep and P.W.4, Zainubi, was taken to the Goa Medical College Hospital. In the cross-examination it was tried to be projected that there were 5 or 6 sessions cases pending against him which was denied by him and he admitted that there was only one sessions case pending against him. He has also denied that he is wanted by the police in many crimes. He denied the suggestion that he had visited the house of the accused and had given the accused threats on several occasions, and had asked the accused to deliver possession of the house to the family of the deceased. He has also denied the suggestion that on the day of the incident he was brought by the accused in order to kill the accused and to grab the property of the accused. He has admitted not to have stated in his statement that on his reaching the house of the complainant, the family members informed him that Zainubi was shot at by accused and she was

lying in the verandah. Omission is also brought out that the accused started abusing deceased Salim and fired the gun on deceased Salim. Omission was brought out in respect of the accused firing a shot at the head of the deceased from a distance of one foot. The omission is only in respect of "one foot".

10. P.W.4, Zainubi, wife of the deceased Salim states that on the day of incident, her son Sakhil wanted to bathe near the well, but deceased Salim, had told Sakhil to clean the gutter before taking bath. Sakhil was, accordingly, cleaning the gutter when the accused and his servant started abusing Sakhil. P.W.1, Safina, came and asked for pocket money for going to the carnival, but P.W.4, Zainubi, asked her to contact her father for money. She states that she was sitting on the steps leading to the courtyard of their house. She suddenly stood up and fell down and realized that her hands were bleeding and she saw the accused holding the gun and pointing it in her direction. Then accused was at that time near the door of his house. Her daughter and her son rushed towards her and took her inside the room. She again heard the sound of the gun being fired and after about 5 to 10 minutes, P.W.3, Azim Khan, came to their house alongwith a person by name Somu. Her husband, Azim Khan and Somu were trying to lift her, by which time she heard another sound and saw that her husband had received injury. Her husband fell near her legs while

Azim Khan and Somu ran outside. The accused came near her husband and fired the gun at the head of her husband. Seeing the blood oozing from the injuries of her husband, she became unconscious. In cross-examination, she admitted that in her statement she had not specifically stated that her daughter Safina had asked for pocket money for going to the carnival parade. She had also admitted that in her statement she had not stated that her husband fell near her legs, but had only stated that her husband fell near her. She had also admitted not to have stated that she became unconscious on seeing the blood of her husband.

11. The prosecution has also examined P.W.8, Somu, who also deposes on similar lines as Azim Khan and further states that when she saw the accused reloading the gun and pointing the gun towards them he threw a stone at the accused which hit the accused. After sometime the police arrived at the scene. Omission was brought out in respect of his not having stated that he alongwith the deceased Sahikh Salim started lifting P.W.4, Zainubi, for taking her inside the room.

12. In view of the defence of the accused, it would be useful to refer to the circumstances which, according to Mr. S. G. Dessai, learned Senior Counsel for the accused, probablize the defence of the accused. Mr. Dessai, learned Senior Counsel has stated that the following circumstances

probablize the defence. They are:-

(a) that the attack by the accused was not a pre-meditated attack in the sense that the accused had not planned to attack any member of the complainant's family;

(b) that the accused at the relevant time was alone in his house as against the other inmates of the house of the complainant, including Azim Khan and P.W.8, Somu;

(c) that the relations between the accused and the deceased Salim Khan were strained;

(d) that the incident of firing was a sequel to an earlier incident of the son of the deceased Sakhil cleaning the gutter;

(e) that cleaning of the gutter itself amounted to provocation; and

(f) that the accused has exercised his right of private defence as the accused had sustained an injury to his forehead.

13. The accused was examined by P.W.7, Dr. Silvano Dias Sapeco, who had found a 6 cms. black contused lacerated wound with 3 stitches at left parietal eminence of scalp. There were dried blood stains at the left side of the ear and neck region. The injury was caused by blunt force or object

and was simple in nature. The x-ray of the scalp did not reveal any fracture.

14. The defence of the accused is that P.W.3, Azim Khan, had been brought by deceased Shaikh Salim and Azim Khan alongwith others had assaulted the accused, who after receiving the injury, had fired on them in self defence intending to kill only Azim Khan. The prosecution evidence in unimpeachable terms has established that it was the accused who had fired first and thereafter P.W.8, Somu, and P.W.3, Azim Khan, had hurled stones at the accused in order to prevent the accused from firing his gun at them. The accused has not been able to probablize at all that Azim Khan had been hired by the deceased Shaikh Salim, to cause any injury to the accused and that the accused had received injury and then had fired his gun. It cannot therefore be said that the accused had exercised his right of private defence. No right of private defence was available to the accused. The evidence of the other prosecution witnesses clearly established that the accused had gone near the place where the deceased Shaikh Salim was lying and had fired the fatal shot from close range. In fact, this is borne out from the medical evidence of P.W.7, Dr.Silvano Dias Sapeco, who had noticed blackening around the entry wound. The submission of the learned counsel for the appellant that the evidence of the eye-witnesses is required to be discarded on account of minor discrepancies, is not well-merited. It is

true that there are minor variations in the evidence of the eye-witnesses. Such minor variations are bound to occur when the prosecution examines more than one eye-witness. The presence of all the witnesses at the scene of the offence, particularly of P.W.1, P.W.2 and P.W.4 is natural. They are the inmates of the house. There is nothing in the cross-examination which would lead the court to draw an inference that these witnesses are not speaking the truth and are suppressing certain vital facts from the Court. The evidence of P.W.4, Zainubi, inspires the confidence of the Court, as she is an injured witness and her cross-examination does not affect her credibility at all. It is highly unnatural to expect the eye-witnesses to depose identical to each other. If minor discrepancies are left out of consideration, the core of their evidence remains intact and, on the basis of their evidence the prosecution has been able to establish that it was the accused who was the aggressor and who had shot at P.W.4, Zainubi and thereafter at deceased Shaikh Salim. The fatal shot was fired by the accused after coming near the deceased Shaikh Salim. Thereafter, an injury on the head of the accused was caused on account of a stone being pelted at him by the other witnesses to prevent the accused from firing his gun at them. Thus, by no stretch of imagination can it be said that the accused had fired his gun in exercise of his right of private defence. The injury sustained by the accused is a simple injury and that injury has been sustained after he had fired his gun.

15. The learned Senior Counsel for the appellant has referred to the decision of the Supreme Court in **Scaria alias Thankan vs. State of Kerala,** 1995 Cri.L.J.3990. This case deals with the fact situation where three persons were about to attack the accused, who had suffered an injury on his forehead and in such circumstances, the Supreme Court held that a reasonable apprehension would be there in the mind of the accused that some hurt would be caused to him. In such circumstances, the Supreme Court held that the accused had exceeded his right of private defence and was, therefore, liable for conviction under Section 304 Part I. The facts of the reported judgment, therefore, do not apply to the facts of the present case.

16. Similarly, reliance is also placed on the judgment of the Supreme Court in **Vidhya Singh vs. The State of Madhya Pradesh,** AIR 1971 SC 1857, where the Supreme Court also found that the accused had a right of private defence but had exceeded that right.

17. Reliance is also placed on the judgment of the Supreme Court in **Deo Narain vs. State of U.P.,** AIR 1973 SC 473, in which the Supreme Court has held that it is not necessary for a party exercising the right of private defence to have actually received some injuries at the hands of the aggressor.

18. Reliance is also placed on the judgment of the Supreme Court in **Yogendra Morarji vs. the State of Gujarat,** AIR 1980 SC 660, in which the Supreme Court has held that the accused has to only probablize the circumstances for establishing that he exercised his right of private defence. Similar view is also taken by the Supreme Court in **Mohd. Ramzani vs. State of Delhi,** 1980 Supp. SCC 215. Similar view has also been taken by the Supreme Court in **Jharmal & Ors. vs. State of Haryana,** 1995 Cri.L.J. 3212.

19. Learned Senior Counsel for the appellant has relied on the judgments of the Supreme Court in **Bhagwan Swaroop vs. State of Madhya Pradesh,** AIR 1992 SC 675, **Harjinder Singh vs. Karnail Singh & Ors.,** AIR 1998 SC 1648, **State of Punjab vs. Ajaib Singh,** 1995 Cri.L.J. 1456, **Kashiram & Ors. vs. State of M.P.,** (2002) 1 SCC 71, **Subramani & Ors. vs. State of T.N.,** (2002)7 SCC 210 and the judgment of the Bombay High Court in **Kasim Babamiya Shaikh alias Mistri vs. State of Maharashtra,** 1996 AIHC 18. All these authorities are inapplicable to the facts of this case.

20. According to us, the prosecution has been able to establish that the accused had fired his gun at P.W.4, Zainubi and injured her and thereafter had killed the deceased Shaikh Salim. The gun was fired at P.W.4, Zainubi, and at the deceased, by the accused, not in the exercise of his right of private defence. The injury to the forehead was

caused to the accused subsequently by P.W.3, Azim Khan and P.W.8, Somu. Therefore, according to us, the prosecution has been able to establish the offence against the appellant/accused under Sections 302 and 307 of the Indian Penal Code. As far as the offence under Section 25 of the Arms Act is concerned, learned Public Prosecutor has fairly conceded that Section 25 of the Arms Act is not attracted to the facts of the present case. Admittedly, the accused was in possession of arms, the licence for possession of which had expired. The conviction of the appellant, therefore, for offences punishable under Section 25 of the Arms Act, is not sustainable.

21. The appellant has not attacked the credibility of the other evidence, namely the medical evidence and the evidence relating to the discovery memorandum. Even otherwise, in the face of the evidence of the eye-witnesses, challenge to the evidence in respect of the discovery memorandum relating to seizure of 9 live cartridges, according to us, is insignificant. The evidence would, at the most, lead the Court to infer that the accused was in possession of live cartridges. Beyond this, the evidence of Safina does not establish any connectivity link.

22. After giving our anxious consideration to the rival submissions of the learned counsel, according to us, the prosecution has been able to establish the offence

against the appellant/accused beyond reasonable doubt, for having committed the murder of Salim and of attempting to commit the murder of P.W.4, Zainubi. The appellant, however, is entitled to be acquitted for the offence punishable under Section 25 of the Arms Act.

23. Accordingly, Criminal Appeal No. 14 of 2004 is partly allowed. The accused is acquitted for the offence punishable under Section 25 of the Arms Act only and the conviction of the appellant for offences punishable under Section 302 and 307 of the Indian Penal Code and the sentence passed thereon are hereby confirmed. Fine, if paid by the appellant/accused, in respect of his conviction under the Arms Act, be refunded to the appellant/accused. The appeal thus partly succeeds.

P. V. HARDAS, J.

N. A. BRITTO, J.

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